No. 2809

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

WILLARD N. JONES,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error to the District Court of the United States for the District of Oregon.

CLARENCE L. REAMES,
United States Attorney for Oregon,
BARNETT H. GOLDSTEIN,
Assistant United States Attorney for Oregon,
Attorneys for Plaintiff in Error.
FULTON & BOWERMAN, of Portland, Oregon,
SCHWARTZ & SAUNDERS, of Portland, Oregon,
Attorneys for Defendant in Error.

SWEENEY, VARNEY & STRAUB, PRINTERS, PORTLAND

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Upon Writ of Error to the District Court of the United States for the District of Oregon.

BRIEF OF APPELLANT.

The appellant, United States of America, appeals from a judgment upon the pleadings rendered by the District Court of Oregon in favor of the defendant, Willard N. Jones.

STATEMENT OF THE CASE.

This is an action at law brought by the Government to recover damages for alleged fraud and deceit committed by the defendant Willard N. Jones in securing the issuance of patents to certain lands within the diminished Siletz reservation in the State of Oregon through the procurement by the defendant of nine entrymen to make fraudulent entries and proofs under the homestead act.

Briefly, the complaint avers that between August 15, 1900, and February 25, 1901, the defendant, intending to deceive the officers of the government, and to defraud and cheat the government out of the title, use and possession of a large portion of its unappropriated public lands open to settlement and entry under the homestead laws, with a view to acquiring title thereto in himself, solicited, induced and entered into a fraudulent arrangement with nine veterans of the Civil War, qualified to make homestead entries, whereby said entrymen should make homestead application for certain heavily timbered lands within the diminished Siletz reservation subject to homestead entry, and should thereafter make and submit fraudulent proofs as to settlement, residence, improvements and cultivation, etc., and that

thereafter, in pursuance to such solicitation, inducement and arrangement, the said entrymen did make such fraudulent proofs; that in reliance upon the said representations contained in said proofs and believing the same to be true, patents were issued to each of the nine entrymen, conveying the title to the land entered; that by reason of the false and fraudulent representations and unlawful collusive and corrupt agreement and understanding between said entrymen and the defendant, the plaintiff was wrongfully and unlawfully induced to issue said patents and part with the title to said lands, to its damage in the sum of $133,000, for which sum judgment is prayed.

The fraudulent representations alleged in the complaint are:

That in said final proofs, each of said entrymen represented that he had established a residence upon the land embraced in said entry; had made substantial improvements thereon; had cultivated that portion of said lands described in his proof and had not conveyed any part of said lands and had not made any contract directly or indirectly whereby the title which he might acquire from the government should inure in whole or in part to the benefit of any person except himself; and that he was

acting in good faith in perfecting the entry; when in truth and in fact, each of said entrymen then and there well know that each and every one of said representations were false; that whatever cultivation and improvement were made, were made by the defendant, who also paid the fees and expenses in connection with such entries; that none of said entrymen acted in good faith nor with the intent to secure a home each for himself, but for speculative purposes, in conformity with the contract set out in the said complaint whereby in pursuance to which, the land entered was thereafter mortgaged to said defendant.

The lands were entered under the act of August 15, 1894 (28 Stat. L. 286, 326), wherein provision was made for disposition of certain ceded lands formerly a part of the Siletz reservation, in language following:

> "The mineral lands shall be disposed of under the laws applicable thereto, and the balance of the land so ceded shall be disposed of until further provided by law under the townsite law and under the provisions of the homestead law. Provided, however, that each settler, under and in accordance with the provisions of said homestead laws shall, at the time of making his original entry, pay the sum of fifty cents per acre in addition to the fees now required by law, and at the time of making final proof shall pay the further sum of one dollar per acre, final proof to be made within five years from

> the date of entry, and three years' actual residence on the land shall be established by such evidence as is now required in homestead proofs as a prerequisite to title or patent."

Subsequently, by act of May 17, 1900 (31 Stat. 179), Congress provided in effect that, upon payment to the local land officers of the usual and customary fees, no other or further charge of any kind whatsoever should be required from such settler to entitle him to a patent to the lands covered by his entry. This was designed as an amendment of the act of August 15, 1894, and relieved the entryman from payment of $1.50 per acre as a prerequisite to obtaining his patent from the government. Subsequently, by act of Congress, approved January 26, 1901 (31 Stat. L. 740), the former acts of Congress opening to homestead entry the ceded Siletz lands were amended by extending the right of commutation to these lands upon the payment of the original price of $1.50 per acre.

The amended answer of the defendant, after a denial of any fraud on the part of either the defendant or the entrymen, sets up four further and separate answers. The first separate defense admitted the making of the instrument or contract with the entrymen alleged in the complaint, but pleaded his good faith; the second sep-

arate defense pleaded the statute of limitations, and the fourth separate defense relates wholly to the measure of damages that should be applied if recovery be had.

For a third further and separate answer and defense it is averred that as to eight of the entrymen (all but Wells) it was not represented in their proofs that they had resided upon their respective claims for a period of three years; the proofs showing only residence varying from thirteen to twenty months supplemented by proof of service in the army or navy of the United States for the remaining period of three years. The defendant then alleged that the plaintiff and its officers in considering and passing on said final proofs well knew that each of said entrymen claimed less than two years actual residence, but that plaintiff and its officers, by mistake of law, allowed to each of said entrymen, credit for military service as a major part of three years actual residence required by law, and by reason of such mistake of law and not otherwise, the patents were issued, but as to the John L. Wells entry, which was commuted, it is alleged that the proof showed only ten weeks actual residence, whereas at least fourteen months actual residence was required by law.

A demurrer was interposed by the plaintiff to the second, third and fourth separate and further answers

of the defendant. The demurrer was sustained as to the second, separate defense which set up the statute of limitations, for the reason that the same question had been previously decided adversely to the defendant (*United States vs. Jones, 218 Fed. 973*); the demurrer was not passed upon as to the fourth separate defense concerning the question of damages. The demurrer, however, was overruled as to the third separate defense, the court holding in an opinion reported in *United States vs. Jones 232 Fed. 219,* that the false representations set out in the complaint were immaterial and afforded no relief to the plaintiff, in that the patents were issued under a misinterpretation of the law, requiring three years actual residence, and it appearing from the proofs themselves that no such residence was claimed, the entrymen were not entitled to patents.

The plaintiff's reply filed herein practically admitting the material allegations of said defendant's third further and separate answer, upon motion of the defendant for judgment on the pleadings, the court allowed the same. Thereupon this action was dismissed; from which judgment this appeal is now prosecuted.

ASSIGNMENTS OF ERROR.

I.

The court erred in allowing and granting defendant's motion for a judgment dismissing the above entitled cause upon the pleadings.

II.

The court erred in holding and deciding that on the face of the pleadings and upon the facts alleged and admitted the plaintiff was not entitled to recover against the defendant.

III.

The court erred in holding and deciding that the fraudulent representations made by the respective entrymen in support of their entries embracing the lands involved in said cause were immaterial.

IV.

The court erred in holding that because of an alleged erroneous allowance by the officials of plaintiff's land department of military service in lieu of a period of actual residence, the false and fraudulent affidavits and proofs made by the homestead entrymen were immaterial, notwithstanding that such false and fraudulent

affidavits and proofs were relied upon as true by officials of plaintiff's land department, and if such affidavits and proofs had not been made no patents for the lands involved would have been issued.

V.

The court erred in holding and deciding that the plaintiff was not entitled to recover, when it appears from the pleadings that the homestead entries embracing the lands involved, in support of which the false and fraudulent proofs of residence were offered, were not in fact made by the respective entrymen for their own benefit, but, on the contrary, were made for the benefit of the defendant, in violation of the law.

VI.

The court erred in holding and deciding that the proof in support of the homestead entry made by John L. Wells showed that the requisite term of residence had not been maintained, and that therefore the false and fraudulent representations made by him were immaterial.

VII.

The court erred in not holding and deciding that the homestead entries embracing the lands involved, hav-

ing been made by the respective entrymen not in their own behalf or for their own benefit, but at the instigation and for the benefit of the defendant, said homestead entries were therefore illegal and fraudulent and constituted the means by which the defendant wrongfully deprived the plaintiff of its title to valuable tracts of land.

VIII.

The court erred in for any reason rendering judgment in favor of the defendant upon the pleadings.

The gist of the various assignments of error is the materiality of the false representations made in securing the patents, and for the purpose of this appeal, it could possibly be briefly stated to raise but one vital question: That, even assuming that the Land Department issued the patents under a misapplication of the law as to the actual period of residence required under the Siletz Act, can it be contended as a proposition of law that the false representations as to the *good faith* of the entrymen, the *purpose* for which the entries were made, and the period of *residence* and *cultivation* actually submitted, are immaterial, when but for such representations, the *patents would under no circumstances have been issued.*

THE QUESTIONS INVOLVED.

I. Whether in an action for fraud and deceit false and fraudulent affidavits and proofs respecting the purpose for which the entries for homestead were made and the terms of residence maintained, and the amount of cultivation and improvement performed upon the land are immaterial, although relied upon, when upon a correct application of the law, the proof as to the term of residence showed that the entrymen were not entitled to patents.

(a) Even with the allowance erroneously made for military service a period of actual residence was necessary;

(b) The proofs as to this residence were false and fraudulent;

(c) An erroneous allowance of military service in place of actual residence does not render the fraud and deceit immaterial;

(d) Military service alone would not have entitled the entrymen to patent;

(e) The homestead law was further violated by the entrymen making the entries not for their own exclusive

use and benefit but for the benefit of a third party and not for the purpose of actual settlement and cultivation.

II. Whether one who has effected his purpose through a fraudulent misrepresentation can deny its materiality.

III. Whether the court can, as a matter of law, hold that certain representations are immaterial when there are facts and circumstances in the case as set out in the pleadings from which a jury might have reached the conclusion that said representations were adequate to and did in fact induce the issuance of the patents which would not have been issued but for such representations.

IV. Whether the false and fraudulent proofs submitted in support of the Wells entry are immaterial notwithstanding that there was a showing that the requisite term of residence had been maintained in reliance upon which the patents were issued.

POINTS AND AUTHORITIES.

I.

THE HOMESTEAD IS A GIFT FROM THE GOVERNMENT AND SHALL BE FOR THE EXCLUSIVE BENEFIT OF THE HOMESTEADER.

(a) A person applying for an entry of a homestead claim shall make affidavit that among other things "such application is made *for his own exclusive use and benefit,* and that his entry is made for the purpose of *actual settlement and cultivation,* and not either directly or indirectly for the use or benefit of any other person."

Sec. 2290 R. S.

Anderson vs. Carkins, 135 U. S. 487.

(b) Before patent is secured the applicant must make final proof by affidavit setting up a compliance with all these requirements and that no part of such land has been disposed of or alienated.

Sec. 2291 R. S.

Anderson vs. Carkins (supra).

Adams vs. Church, 193 U. S. 510.

(c) All of these requirements must be complied with in order to entitle the entrymen to patent.

United States vs. Mills, 190 Fed. 513.

United States vs. Minor, 114 U. S. 233.

United States vs. Diamond Coal & Coke Co., 233 U. S. 236.

United States vs. McCaskill, 216 U. S. 504.

(d) The purpose and policy of the homestead law is to encourage the settlement and improvement of the public lands.

McCorkell vs. Herron, 128 Ia. 324; 111 Am. St. 203.

II.

THE PATENTS FOR HOMESTEADS WERE ISSUED TO AND OBTAINED BY THE ENTRYMEN THROUGH THE PROCUREMENT OF DEFENDANT BY PROOFS TAINTED WITH FRAUD AND FALSE REPRESENTATIONS, FOR WHICH A CAUSE OF ACTION FOR DECEIT WILL LIE.

(a) Where patents are procured from the United States by fraud or mistake, the government may elect to rescind the patent or to ratify it and sue for damages.

United States vs. Pitain, 224 Fed. 604.

United States vs. Koleno, 226 Fed. 181.

United States vs. Bistline, 229 Fed. 546.

United States vs. Southern Pac. Co., 200 U. S. 341.

United States vs. Cooper, 220, F. 868.

(b) A patent will be canceled either on the ground that it was obtained by false and fraudulent statements or that it was issued through the inadvertence or mistake of the officers of the land office where both grounds are alleged. The bill may be sustained upon the latter ground if proved, although the proof fails to fully establish the first ground.

United States vs. Mills, 190 Fed. 513.

(c) The patent will be canceled on the ground of false and fraudulent statements in making proof of actual residence.

United States vs. Perry, 45 Fed. 759.

United States vs. Mills, 190 Fed. 513.

United States vs. Murphy, 193 Fed. 802.

(d) A patent will be canceled on the ground of false and fraudulent statements in making proof of actual cultivation.

United States vs. Minor, 114 U. S. 233.

(e) A patent will be canceled where the defendant induced another to make a homestead entry for the defendant's benefit.

United States vs. Gilson, 185 Fed. 484.

United States vs. Belt, 192 Fed. 708.

United States vs. Brant, 198 Fed. 449.

United States vs. Booth-Kelly Lumber Company, 203 Fed. 423.

(f) A patent will be canceled or an action for the value of the land will lie where said patent was issued contrary to law or through an erroneous interpretation of the law applicable thereto.

United States vs. Southern Pacific Co., 200 U. S. 341.

United States vs. Southern Pacific Co., 117 Fed. 545.

United States vs. O. & C. R. R. Co., 133 Fed. 954.

United States vs. Germania Iron Co., 165 U. S. 379.

(g) A patent will be canceled where all the requirements of the homestead law are set at naught and evaded and defied by one stupendous falsehood which included all of the requirements on which the right to secure the land rested.

United States vs. Minor, 114 U. S. 233.

United States vs. Mills, 190 Fed. 513.

III.

WHERE SEVERAL REQUIREMENTS TO COMPLY WITH THE HOMESTEAD LAW ARE ESSENTIAL A MISINTERPRETATION OF THE LAW AS TO ONE DOES NOT RENDER IMMATERIAL THE FALSE REPRESENTATIONS CONCERNING THE REMAINING REQUIREMENTS.

(a) False representations inducing a contract are material if the contract would not have been made but for such representations.

Bigelow on Fraud, Vol. I, p. 544.

A. & E. Enc. of Law, Vol. 14, p. 62.

Lane vs. Harmony, 112 Me. 25.

White Sewing Machine Co. vs. Bullock, 76 S. E. (N. C.) 634.

12 R. C. L. 297.

(b) It is not necessary to prove that the plaintiff relied solely upon the defendant's representations. It is sufficient if the representations were relied upon by the plaintiff as constituting one of the substantial inducements to his action.

Bigelow on Fraud, Vol. I, p. 544.

Smith on Fraud, Sec. 61.

James vs. Hodson, 47 Vt. 127.

(c) It is enough that the representations materially influenced the conduct of the plaintiff though (being combined with other motives) they were not the sole or even predominant inducement to the party's action.

Bigelow on Fraud, Vol. I, p. 544.

Safford vs. Grout, 120 Mass. 20.

IV.

MATERIALITY OF FALSE REPRESENTATIONS.

(a) One who has effected his purpose through a fraudulent misrepresentation cannot deny its materiality.

Bigelow, Vol. I, p. 497.

Bigelow on Estoppel, 6th Ed. p. 646.

Antle vs. Sexton, 137 Ill. 410.

Kehl vs. Abram, 210 Ill. 218.

Dodge vs. Pope, 93 Ind. 480.

Dezell vs. O'Dell, 3 Hill 215.

Warder vs. Ehitish, 77 Wis. 430.

Brent vs. Lilly Co., 174 Fed. 877.

Strand vs. Griffith, 97 Fed. 854.

Tooker vs. Alston, 159 F. 599.

Reynell vs. Sprye, 1 De G. M. & G. 710.

Lunnington vs. Strong, 107 Ill. 302.

Fargo Gas Light & Coal Co. vs. Fargo Gas & Elec. Co., 37 L. R. A. 593.

(b) Where the existence of fraud depends on a variety of circumstances, the matter of materiality of the representations is for the jury and not for the Court.

Newhall vs. Pierce, 115 Mass. 457.

Fottler vs. Moseley, 179 Mass. 295.

Sharp vs. Ponce, 74 Me. 470.

Bank of Bay City vs. Chappelle, 40 Mich. 447.

McNaughton vs. Smith, 91 Minn. 140.

Mosbey vs. McKee, 91 Mo. App. 500.

Sou. Commission Co. vs. Porter, 122 N. C., 692.

Kehl vs. Abram, 210 Ill. 218.

Hawley vs. Wicker, 117 N. Y. App. Div. 638.

Simon vs. Goodyear Metallic Rubber Shoe Co., 105, F. 573.

Patten vs. Field, 81 Atl. 77.

V.

THE PROOF IN SUPPORT OF THE WELLS ENTRY, UNDER A CORRECT APPLICATION OF THE LAW, SHOWED THAT THE REQUISITE TERM OF RESIDENCE HAD BEEN MAINTAINED TO ENTITLE HIM TO PATENT AND THE PROOF BEING FRAUDULENT AND FALSE AN ACTION FOR DAMAGES WILL LIE.

(a) Wells, one of the entrymen, was entitled to commute after making proof of settlement and of residence and cultivation for a period of fourteen months.

(b) The question of residence is largely one of bona fides, and not one of actual presence upon the entry, and therefore the proof in support of the Wells entry on its face showed that the requisite term of residence had been maintained.

Sec. 2301, R. S.

(c) "Actual residence" is not synonymous with "actual presence upon the entry." This question turns upon the bona fides of the entrymen—necessarily a question of fact.

Waley vs. Northern Pacific R. R. Co., 167 Fed. 665.

U. S. vs. Richards, 149 Fed. 445.

ARGUMENT.

The allegations in the complaint disclose a clear, palpable and deliberate fraud practiced upon the government, by means of perjury, deception, circumvention and a flagrant violation of the homestead laws, to deprive it unlawfully of public land of the value of $133,000. The lower court has held that the government is without remedy or redress. It would be inconceivable and unconscionable that the plaintiff would be absolutely without remedy on account of the fraud perpetrated in depriving it of valuable land and to permit the defendant to reap the fruits of said fraud. Upon the face of the record it is apparent that the government was imposed upon, deceived and cheated by the fraud and false swearing of the entrymen under a collusive arrangement had with defendant who was to benefit thereby.

There can be no question of the fraud and its misleading effect upon the officers of the government entrusted with the disposition of the public lands. Can relief be denied and the beneficial policy of the government thwarted by subtle technicalities, evasions and a perversion of law? We doubt it. We have too great a veneration for the law to suppose that anything can be law which is not founded on common sense and common honesty.

Before entering into a discussion of the questions involved in this case, it might be well to briefly summarize:

1. The law under which the patents were issued;

2. The gist of alleged fraud committed by the defendant;

3. The decisions applicable to the requirements prerequisite to patent, and

4. The remedy provided where fraud is practiced upon the government in connection therewith.

1. The entries mentioned in the complaint were made under the act of August 15, 1894 (28 Stat. 286, 326). The act, in brief, throws open to disposition for settlement certain ceded lands formerly a part of the Siletz reservation. It specifically provides in dealing

with this land that three years actual residence on the land is required in making a final proof as a prerequisite to title or patent. This requirement is seized upon by the defendant for his cloak of immunity to shield and protect him in the enjoyment of his spoils.

It may be conceded at the outset that this requirement means actual residence for a term of three years, and not for a portion thereof supplemented by time for military or other service. In issuing the certificates and granting the patents, the land department, under a misinterpretation of the law relative thereto, allowed the military service of eight of the entrymen to be deducted from the time of residence which in each case was less than three years, and in doing so put into effect and applied the provisions of sections 2304 and 2305 revised statutes, and the act of January 26, 1901 (31 Stat. 740), relating to the commutation of homestead entries in certain cases. The act of August 15, 1894, as it applies to the Siletz reservation lands admits of no such application and permits no commutation. But, it must be borne in mind that the requirement as to term of residence in the last mentioned act does not supersede or render unnecessary the general requirements of the homestead law relative to qualifications of entrymen, and the purpose for which application for entry was made.

It merely limits and defines the period of actual residence required so far as the Siletz lands are concerned.

Section 2290 of the revised statutes provides that a person applying for entry of a homestead claim shall make affidavit that among other things *"such application is made for his own exclusive use and benefit,"* and that his entry is made *for the purpose of actual settlement and cultivation,* and not either directly or indirectly for the use or benefit of any other person.

Section 2291 of the revised statutes, which prescribes the time and manner of the final proof, requires that the applicant make "affidavit that no part of such land *has been alienated,* except as provided in section 2288," which section, however, does not contemplate or embrace the alienation of the land as set out in the complaint.

2. It is charged that the defendant, with the intent to deceive the officers of the United States having authority over the public lands, and to defraud plaintiff out of the title to a large portion of its unappropriated lands open to settlement and entry under the homestead laws, solicited and procured certain persons named therein to make homestead applications and affidavits, each application being for 160 acres of land. The following is a list of the persons who made said applications, to-

gether with the number and date of same, as well as the date of final proof:

Benjamin S. Hunter, No. 13135, October 9, 1900; final proof Dec. 23, 1901.

Oliver I. Connor, No. 13116, October 6, 1900; final proof Nov. 4, 1901.

Wm. Teghtmeier, No. 13396, February 25, 1901; final proof May 26, 1902.

Richard D. Depue, No. 13113, October 5, 1900; final proof Nov. 25, 1901.

Joseph Gillis, No. 13088, October 1, 1900; final proof Nov. 4, 1901.

Thomas Johnson, No. 13089, October 1, 1900; final proof Nov. 4, 1901.

John L. Wells, No. 13090, October 1, 1900; final proof May 26, 1902.

Edward C. Brigham, No. 13137, October 9, 1900; final proof Dec. 23, 1901.

Anthony Gannon, No. 13087, October 1, 1900; final proof Nov. 25, 1901.

That at the time of soliciting and procuring such persons to make such applications, and before the filing

of same, the defendant had induced each of said entrymen to subscribe to a contract, as fully set out in said complaint, wherein and whereby the defendant intended to conceal his design and to acquire title to the lands applied for by said entrymen and to conceal the fact that it was the intention of said defendant and entrymen to retain the then places of residence of each of said entrymen; that it was not intended by said defendant for said entrymen to reside upon or make their home upon the lands applied for during the life of said entries as required by law; that it was further wrongfully intended and designed by said defendant that each of said entrymen should falsely make proof that he had established a residence upon the lands and had resided continuously thereon for the length of time prescribed by law; that each of said entrymen had cultivated a substantial portion of said lands and had made substantial improvements thereon, when in truth, as the defendant well knew, none of the said entrymen would at the time of making said proof have established a residence upon the lands nor resided thereon, would not have cultivated any part thereof, nor have made any improvements thereon; that thereafter the defendant, in order to carry out the said fraudulent intention and design, and pursuant to the fraudulent and collusive understanding and agree-

ment entered into between them, the said defendant caused each of said entrymen to make final proof, wherein and whereby each of said entrymen falsely and fraudulently represented:

(a) That he had established a residence upon and resided upon the land continuously after the alleged establishment of residence thereon until the time of said proof;

(b) That he had made substantial improvements thereon;

(c) That he had cultivated the lands;

(d) That he had not conveyed any part of said lands and had not made any contract directly or indirectly whereby the title which he might acquire from the government should inure in whole or in part to the benefit of any person except himself; and

(e) That he was acting in good faith in perfecting the entry.

When in truth, as each of said entrymen then and there well knew at the time of making said proofs, that each and every one of said representations were false; when in truth all of the entrymen in making their respective entries continued at all times during the life of their respective entries to reside at Portland, Oregon, except

Benjamin S. Hunter, who resided at all of said times at Dundee, Oregon.

It is further charged that the defendant paid to the United States the required fees and furnished proof witnesses and other expenses in connection with said entries, for the purpose of defrauding the government out of said lands; that the land officers of the United States, being ignorant of the false and fraudulent representations, issued final certificates to each of said entrymen who thereafter received patents and executed a mortgage to the defendant in conformity with their collusive agreement; that all of said false and fraudulent representations made by the said entrymen were made with knowledge and at the solicitation of the defendant, and with the intent to defraud the government out of the use of the title to and possession of the lands; that the plaintiff relied upon the false and fraudulent representations and was defrauded thereby, and by reason of such false representations and unlawful, collusive and corrupt agreement between said entrymen and defendant, plaintiff was wrongfully induced to issue patents and part with title to said land to its damage in the sum of $133,000.

The gist of plaintiff's complaint, in substance, is the fraud and deceit of defendant in procuring nine entry-

men to make false and fraudulent representations in their applications and final proof for homestead which were relied upon by the defendant, who in reliance thereupon issued patents to the lands of the value of $133,000.

The false and fraudulent representations complained of consist in:

(a) Falsely swearing to have established a residence upon and resided upon the land continuously;

(b) Falsely swearing to have made substantial improvements thereon;

(c) Falsely swearing to have cultivated the lands;

(d) Falsely swearing that he had not conveyed any part of said lands and had not made any contract directly or indirectly whereby the title which he might acquire from the government should inure in whole or in part to the benefit of any person except himself; and

(e) Falsely swearing that he was acting in good faith in perfecting the entry.

It is further claimed that *all of said representations* contributed to the fraud perpetrated on the plaintiff by the defendant.

The vital point raised by defendant's answer is directed against the mistakes of the officers of the land de-

partment in issuing patents where there was no proof of the specific actual residence of three years, as required by the act under which said lands were opened to entry. It will thus be seen that the whole defense of the defendant rests on the plea that the government having erred in issuing the patents so far as the requisite term of residence was concerned, it matters not how false the representations were as to the actual duration of residence upon the land, how false the representations were as to the actual duration of residence upon the land, how false the representations were as to cultivation and improvement of the land, how false the representations were as to alienation of the land, how false the representations were as to the purpose for which the entry was made and patent sought, and how false the representations were as to the good faith of the entrymen.

3. The purpose of the homestead law is said by Mr. Justice Brewer in *Anderson vs. Carkins,* 135 U. S. 487:

> "That the homestead shall be for the exclusive benefit of the homesteader."

And in *McCorkell vs. Herron,* 111 Am. St. 203, 128 Ia. 324, it is said:

> "The purpose and policy of the homestead act are to encourage the settlement and improvement of the public lands."

And further, in *Anderson vs. Carkin* (*supra*) and *Adams vs. Church,* 193 U. S. 510, it is said:

> "The homestead is a gift from the government to the homesteader conditioned upon his occupation for five years and upon his making no disposition or alienation during said term."

In *U. S. vs. Richards,* 149 Fed. 445, the court said:

> "The object and purpose of the homestead law of the United States were to grant land to actual bona fide settlers, persons making settlement upon the public lands for use as homesteads and to encourage residence upon, cultivation and improvement of the public domain. The applicant is required to verify that his statement is in good faith and made for the purpose of actual settlement and cultivation and not for the benefit of any other person."

It is held in *United States vs. Minor,* 114 U. S. 233, and in *United States vs. Mills,* 190 Fed. 513, that the homestead law required in every instance the *settlement* and *residence* for a given time on the land, the actual cultivation of part of it, and that the claimant should do this with the purpose of acquiring real ownership in himself and not for another nor with the purpose of selling to another. In the case as presented by the complaint, none of these things were done, although the land officers were made to believe they were done by the false representations of the entrymen. It was a case where all the

requirements of the law were set at naught and evaded and defied by one stupendous falsehood, which included all the requirements on which this right to secure the land rested. (U. S. vs. Minor, supra.)

Where the beneficence of the government is imposed upon, its kind and philanthropic purposes set at naught by the fraud of the beneficiary, its aims and objects thwarted by the cunning of those who prey upon the credulous, and its goodness rewarded by ingratitude and deception, is there anything to be found in the relation of the government in such a case as this which will deprive it of the same right to relief as an individual would have? On the contrary, there are reasons why the government in this class of cases should not be held to the same diligence in guarding against fraud and imposition as a private owner of real estate. The government owns immense tracts of land which are placed in the hands of officers of the government, subject to entry under the homestead laws, and usually these officers are from necessity forced to act solely on the ex parte statements of the claimants and their witnesses (United States vs. Minor, supra), and where it has come to the knowledge of the government that a patent has been obtained through fraud and deception practiced upon the officers of the land department, and that such fraud would prejudice

the interests of the United States and interferes with the government in fulfilling its obligations to the public, it is the duty of the government to institute judicial proceedings. The case in issue is, therefore, in the interest of public right and justice to correct a public wrong and fraud perpetrated by the defendant upon the government.

As stated in the case of the *Diamond Coal & Coke Co. vs. United States,* in 233 U. S. 236:

> "Questions of fact arising in the administration of the public land laws, such as whether lands sought to be entered are mineral or non-mineral, are committed to the land officers for determination; and as their decision must rest largely or entirely upon proofs outside the official records, it is possible in *ex parte* proceedings, as was the case here, for applicants, by submitting false proofs, to impose upon those officers and secure entries and patents under one law, when if truthful proofs were submitted the lands could not be acquired under that law, but only under another imposing different restrictions upon their disposal. *A patent secured by such fraudulent practices, although not void or open to collateral attack,* is nevertheless voidable, and may be annulled in a suit by the Government against the patentee or a purchaser with notice of the fraud."

4. By a long line of cases it has been held that where lands are procured from the United States by fraud or mistake the government may elect to rescind the patent,

where it has not passed to an innocent third party, or in any event to ratify it and sue for damages.

In *Southern Pacific Company vs. United States,* 200 U. S. 341, the court held, in part, as follows:

> "When by mistake a tract of land is erroneously conveyed so that the vendee has obtained a patent, which does not belong to him and before the mistake is discovered, the vendee conveys to a third party purchasing in good faith, the original owner is not limited to a suit to cancel the conveyance and re-establish in himself the title, but he may recover of his vendee the value of his land up to at least the sum received on the sale and thus confirm the title in the innocent purchaser."

In the recent cases of *United States vs. Pitain,* 224 Fed. 604; *United States vs. Koleno,* 226 Fed. 181; and *United States vs. Bistline,* 229 Fed. 546, each of which was an action at law to recover damages for fraud in obtaining a patent under the homestead law and in each of which was involved the question of whether the United States in seeking redress was remitted to a suit in equity, the several courts in all of said cases held that patents procured from the United States by fraud are not void but voidable, and the government may elect to rescind the patent or to ratify it and sue for damages, and as tersely stated in *United States vs. Minor,* 114 U. S. 241, the government is entitled to all the remedy which the

court can give. The government, therefore, having the choice of two remedies where fraud has been perpetrated in acquiring patent, one for the recovery of the land where it has not passed to innocent purchasers, and the other for the value of the lands taken, it has in this case proceeded upon the latter theory.

The following cases are submitted in support of the proposition that where false and fraudulent statements are made by the entrymen as to any or all of the requirements, or even where patents are issued through the inadvertence or mistake of the officers of the land department, the patents will be canceled.

United States vs. Mills, 190 Fed. 513.

In this case, the defendant, in making a final proof under the homestead law, testified falsely as to the required residence and cultivation. The court held that both residence and cultivation of the land are required to entitle the entrymen to patent; that it was not intended that the patent should be granted when the entrymen never lived on the land, when he could have lived on it if he wished to do so, and when during the entire five years succeeding the filing of the claim he had a home and residence elsewhere; that if a claimant obtains a patent by false and fraudulent statements or evidence, the gov-

ernment, by direct proceedings in equity, can have it annulled, and the same rule obtains where by mistake or inadvertence of the officers of the land office the claimant procures a patent; that in cases where the allegations of the bill and the evidence point to fraud and wrong and also point to inadvertence and mistake, the bill may be sustained upon the latter ground if proved, although the proof fails to thoroughly establish the first ground.

United States vs. Perry, 45 Fed. 759.

This was a suit to cancel a patent issued under the homestead law. In this case the court, among other things, stated that the object of this law was to grant land to actual settlers for use as homesteads and to encourage the settlement, cultivation and improvement of the public domain; that in order to obtain valid title under this law it was necessary that there should be an *actual settlement of the land* and a *continuous residence* and *cultivation* thereon for at least five years; that the proofs taken in this case clearly show *no actual residence* prior to the issuance of patent, and the law not having been complied with, no right to a patent existed at the time the proofs were taken or at the time the patents issued.

United States vs. Murphy, 193 Fed. 802.

This was a suit to set aside a patent issued for a homestead entry. The evidence showed that there had been no such actual, continuous residence on the land by the homesteader with the intention of establishing a home there to the exclusion of one elsewhere, as the law required, or that the required improvements had been made.

United States vs. Minor, 114 U. S. 233.

This was a suit to set aside a patent on the ground of fraud. The court held that where one succeeded in obtaining patent by misrepresentations, by fraudulent practices aided by perjury, there would seem to be no reason why the United States as the owner of the land of which it has been defrauded by these means, should have all the remedy which the courts can give; that it was convinced that the officers of the land department were imposed upon and deceived by the fraud and false swearing of the party to whom the patent was issued; and that there could be no question of the fraud and its misleading effects on the officers of the government. The opinion, in part, reads as follows:

> "If an individual or a corporation had been induced to part with the title to land or any other property by such a fraud as that set out in the pleading, there would seem to be no difficulty in recovering it back by appropriate judicial proceed-

ings. If it was a sale and conveyance of land induced by fraudulent misrepresentation of facts which had no existence, on which the grantor relied, and had a right to rely, and which were essential elements of the consideration, there would be no hesitation in a court of equity giving relief, and where the title remained in the possession of the fraudulent grantee, the court would surely annul the whole transaction and require a reconveyance of the land to the grantor. The case presented to us by the bill is one of unmitigated fraud and imposition consummated by means of representations on which alone the sale was made, everyone of which was false. The law and the rules governing the sales require in every instance, the settlement and residence for a given time on the land, the actual cultivation of a part of it, and building a house on it. It required that the claimant should do this for the purpose of acquiring ownership for himself and not for another, nor with a purpose to sell to another. In the case as presented by this bill, none of these things were done, though the land officers were made to believe they were done by the false representations of the defendant."

United States vs. Gilson, 185 Fed. 484.

In this case patent was issued to one Landis, who thereafter conveyed same to defendant Gilson. This was a suit to cancel patent on the ground that Landis did not enter the land under the homestead law in good faith, to acquire a homestead for himself, but acted as the instrument of Gilson to acquire title for the latter's use and benefit. The evidence showed that defendant in-

duced another man who was old, destitute and decrepit, to make a homestead entry of land not his own, paid the entry fees, and for the relinquishment of a prior entry, kept the entrymen in supplies until the entry was commuted; furnished the money to pay the commutation price, took a mortgage therefor and possession of the land, and a deed as soon as patent was issued; also that the proof of the improvement and cultivation on which the commutation was allowed was false, to the knowledge of defendant. The court held that this was sufficient to establish that the entry was made for the defendant's benefit and was fraudulent and to authorize the cancellation of the patent.

NOTE: The similarity of the facts in the case cited and the one at issue is most apparent. The case against Jones is made clear by the contract he entered into with the entrymen prior to the entries, the payment of the fees by Jones, and the subsequent conveyance of mortgage to him, in pursuance to the terms of the contract.

United States vs. Belt, 192 Fed. 708.

In this case defendant, who was a large owner of sheep which he pastured on the public lands, procured different persons to file homestead and stone and timber claims on lands within his range, paying their filing fees,

the expenses of their residences, and improvements, purchase price of the lands on commutation of entries and the further sum to each entryman, all of whom conveyed their lands to him on obtaining title. The homestead entrymen did not comply with the law as to residence and improvement, and their proofs were fraudulent. The court held:

> "That such facts were sufficient to show that the entries were made under an agreement or understanding expressed or implied with the defendant that they were for his benefit, and that therefore, the United States was entitled to a cancellation of the patents for fraud."

United States vs. Brandt, 198 Fed. 449.

This was a suit to cancel patent on the ground of alleged fraud in making entry and in procuring patent. The fraud consisted in this, that the entry was not made in good faith for the entryman's own benefit, and for the purpose of acquiring the same as a home for himself, but was made at the instance and for the purpose of acquiring the land for another. The court held:

> "That the land was fraudulently entered and that the patent be set aside and canceled."

McCaskill Co. vs. United States, 216 U. S. 504.

Mr. Justice McKenna, in speaking of the requirements of the homestead law said:

> "It may be well here to consider what the law requires. It gives the right of entry of 160 acres of land as a homestead, upon the condition, however, which must be established by affidavit, that 'application is honestly and in good faith made for the purpose of actual settlement and cultivation and not for the benefit of any other person'; that applicant will honestly endeavor to comply with the requirements of settlement and cultivation and does not apply to enter the same for the purpose of speculation. The purpose of the law, therefor, is to give a home, and to secure the gift the applicant must show that he has made the land a home. Residence and cultivation of the land are the price that is exacted for its payment."

United States vs. Booth-Kelly Lumber Co., 203 Fed. 423.

This was a suit for the cancellation of patents to public lands entered under the stone and timber act on the ground of fraud. The evidence showed that the entries were made for the benefit of the defendant lumber company which paid the government price and all fees and expenses and gave each entryman a bonus on receiving a deed to his land. The court held that the same was sufficient to sustain the allegations of the bill and to entitle the complainant to the cancellation of all patents.

United States vs. Cooper, 220 Fed. 868.

This was a suit against a purchaser of land from a patentee to annul the patent and set aside the deed to defendant. It was held that where a patent to land had been secured by fraud and thereafter the patentee had conveyed the land to a third party, that while the land was beyond recovery by the government, a money judgment against the defendant with a lien on the land therefor was warranted by the prayer for general relief.

United States vs. Southern Pacific Co., 117 Fed. 545.

This was a suit to recover lands patented through error of the land department, or their value, when sold to bona fide purchasers. The complaint alleged that officers of the government in due and orderly course of proceedings, but misinterpreting the law applicable thereto, issued to the railroad company patents to certain tracts of land which the railroad company thereafter conveyed to bona fide purchasers. The court held that the fact that the error in issuing patents to the railroad company for lands to which it was not entitled under its grant was that of the land department constituted neither a legal nor an equitable defense to an action by the United States to recover such lands or their value when sold to bona fide purchasers. We quote from the opinion:

> "That the government title to the lands thus patented to the defendant railroad company thereupon passed to that company is not questioned and it is equally clear that under the decisions herein cited the title was erroneously so conveyed and wholly without consideration. The right of the government, the real owner of the land, to maintain in a court of equity, a suit to set aside such conveyance and re-establish its title, cannot be doubted."

It will be seen that the courts have heretofore not hesitated to grant redress to the government when patents were issued through a misapplication of the law as in this instance. And where this error of the government was induced by the fraud of the defendant it is inconceivable that the government should be deprived of any redress and the defendant permitted to enjoy the fruits of his fraud.

The case of *United States vs. Southern Pacific,* 117 Fed. 545, was affirmed in 133 Fed. 651, where the opinion, in part, reads as follows:

> "The railroad company received patents for lands under an erroneous interpretation of the law. It was a clear mistake and conveyed no rights or title whatever to the railroad company to any of the lands in question. The company sold a portion of the lands to bona fide purchasers. Not having any title to the lands and having received the money for the lands, it must be held responsible to pay the amount specified in the act."

And to like effect is the case of *United States vs. Oregon and California Railroad Company,* 133 Fed. 954, which held that the United States has the right to have canceled patents to lands erroneously issued under a railroad grant, and also to recover from the grantee the government price of the lands so patented and sold to bona fide purchasers and a suit to enforce such rights may be maintained in a court of equity. This latter decision was affirmed in 144 Fed. 832.

In *Germania Iron Co. vs. United States,* 165 U. S. 379, it was held that if while disputed matters of fact concerning a tract of land or the priority of right of claimant thereto are pending unsettled in the land department, and patent erroneously issues for the tract through inadvertence or mistake, a court of equity may rightfully interfere to cancel the patent.

In *Williams vs. U. S.* 138 U. S. 514, the court said:

> "If through inadvertence and mistake, a wrong description is placed in a conveyance of real estate by an individual, a court of equity would have jurisdiction to interfere and restore to the party the title which he never intended to convey and it has a like jurisdiction when a wrong description from a like cause gets into a patent of public land. If the allegations of a bill point to fraud and wrong, and equally to inadvertence and mistake, and the latter be shown, the bill is sustainable although the former charge may not be fully established."

In *Southern Pacific Co. vs. United States,* 200 U. S. 341, it was held that the right of the United States to avoid and annul patents erroneously issued by the land department by bill in equity is sustained by an unbroken line of authority.

These few citations must be eloquent proof of the attitude of the courts with regard to patents obtained through error of the land department. It has ever been ready to accord prompt relief in such cases and has not restricted it to any one remedy. It sanctioned all the remedies at its disposal. To deny relief in such cases would be to open the door to many possibilities of wrong if the innocent or unintentional error or omission of the officers of the land department can be operated to deprive it of its appropriate jurisdiction; it affords too strong an inducement for an intentional omission, proof of which may well be beyond the power of the government. No reason can be offered why one who parts with no consideration, gives nothing in return and receives valuable land from the government through a misinterpretation of the law, should be permitted to take advantage of another's error, particularly when the result of such error may deprive honest homesteaders of the merited beneficence of the government. The courts are no less prompt to grant relief in cases where patents are

secured through fraud and misrepresentations, and thus in a measure endeavor to avoid encouragement of fraudulent and deceitful practices. To shut one's eyes to the conduct of the defendant and to refuse relief to the government would be to put a premium on fraud.

Where both the error and omission of the land department and the fraud of the patentee are present as in the case at issue, the right of the government to pursue any appropriate remedy at its disposal to obtain redress would seem to be unquestioned. It has in this case elected to ratify the patents and sue for the value of the lands. The defendant now attempts to defeat recovery by stating that the fraudulent representations were immaterial. It thus becomes necessary to discuss at some length the elements of fraud, particularly with regard to the subject of materiality and rules and citations governing the same.

I.

IN AN ACTION FOR FRAUD AND DECEIT FALSE AND FRAUDULENT AFFIDAVITS AND PROOFS RESPECTING THE PURPOSE FOR WHICH THE ENTRIES FOR HOMESTEAD WERE MADE AND THE TERMS OF RESI-

DENCE MAINTAINED, AND THE AMOUNT OF CULTIVATION AND IMPROVEMENT PERFORMED UPON THE LAND ARE MATERIAL WHEN RELIED UPON, THOUGH UPON A CORRECT APPLICATION OF THE LAW THE PROOF AS TO THE TERM OF RESIDENCE SHOWED THAT THE ENTRYMEN WERE NOT ENTITLED TO PATENTS.

The gist, the intrinsic ingredient of this action, was the fraudulent scheme—the false representations of this defendant, through inducing the entrymen to make fraudulent entries and proofs under the homestead act, whereby the defendant was deceived and induced to part with title to valuable tracts of land. In brief, it is alleged that the defendant, for the purpose of defrauding the United States, induced certain persons named in the complaint to make homestead applications for lands within the former Siletz reservation subject to homestead entry, and then to make final proof showing:

(1) Residence; (2) Cultivation and improvement; (3) Non-alienation; and (4) Good faith; when in fact there had been no residence, no cultivation or improvement for the period required by law; the lands had been the subject of contract for the purpose of alienation to

the defendant; the entrymen had throughout acted in bad faith, had no intention of ever becoming homesteaders and thereby had flagrantly violated the beneficent policy of the government.

It therefore appears that the entrymen obtained their patents from the government by fraud and perjury. There is no crime more destructive of morals and good government than that of perjury. But, contends the defendant, upon the face of the proof it appears that the land department erred in the issuance of the patents, for in no instance was there any proof offered that the entrymen had actually resided upon the lands the three years period required by law, and that thereby the representations made were immaterial. It may be conceded that the land department believing that the entrymen by reason of their military service was entitled to a period of commutation from the time of residence as authorized under other homestead acts, erred in that respect for the act under which these lands were thrown open to settlement made no provision for commutation.

(a) But even with the allowance erroneously made for military service a period of actual residence was necessary and the proofs as to this residence were false and fraudulent.

(b) An erroneous allowance of military service in place of actual residence does not render the fraud and deceit immaterial;

(c) Military service alone would not have entitled the entrymen to patent; and

(d) The homestead law was further violated by the entrymen making the entries not for their own exclusive use and benefit but for the benefit of a third party and not for the purpose of actual settlement and cultivation.

There certainly can be no dispute as to requirements necessary to be met before patent issues. When the several entrymen made their proofs, it was necessary for them to make certain statements upon the truth of which depended their right to patent. Even with the erroneous allowance for military service the government demanded proof of the fulfillment of certain other requirements. The fact that the entrymen were veterans of the Civil War and thereby entitled in certain cases to commutation would not in itself have induced the land department to have issued patents. First of all it was necessary to make proof of some period of actual residence. Such proof was submitted and it was false and fraudulent. Without this proof no patents would have been issued irrespective of the military service of the entrymen.

Secondly, it was necessary to make proof of substantial cultivation and improvement of the land. Such proof was submitted and it was false and fraudulent.

Thirdly, it was necessary to make some proof that the entries were made for the exclusive use and benefit of the entrymen and for the purpose of actual settlement and cultivation and that the land had not been alienated. All of such proof was submitted and it was in all respects false and fraudulent; therefore, it must be quite apparent that the military service which was erroneously allowed was in itself not sufficient to authorize the issuance of patents. The patents would not have been issued but for the false and fraudulent representations made as to the other essential requirements as well. How then, can it be said that the military service alone, even though an error was made in its allowance, could have been the sole and inducing cause to the issuing of the patents?

We may concede at the outset that in order to constitute fraud the false representations must be as to material facts. What are material facts are not always susceptible of a fixed rule. In determining what is a material fact one must take into consideration a number of circumstances. The circumstances in which fraud is accomplished are so varied and the character of the mis-

representations so widely different that it is unwise to attempt to enunciate with precision a general rule or standard by which all cases can be governed. Courts and legislatures do not attempt to define with exactness what shall constitute fraud in all cases. Should they do so, unscrupulous ingenuity would devise some other method of committing it and then claim that what was done was not within the definition. It is therefore left to be found from all the facts and circumstances of each particular case.

SMITH ON FRAUD, SECTION 61, says that A REPRESENTATION IS MATERIAL WHEN BUT FOR IT THE CONTRACT WOULD NOT HAVE BEEN MADE.

This definition seems to be most apropos to the case at hand, and must of a certainty answer all the arguments that defendant can be ingenious enough to advance in support of his unlawful venture. It is apparent that the Government was deceived and beguiled into issuing patents which it would not have done but for reliance upon the wilfully false statements of the entrymen made to induce their issuance. It cannot be doubted that the falsity of the statements operated to the prejudice of the plaintiff and was a matter of inducement, thereby being material.

Therefore, applying this definition found in the text book of *Smith on Fraud,* which seems to be the most frequently cited and approved, being succinct and expressive, it is not difficult to declare that all of the representations made by the entrymen are material in that the one representation as to residence, even under a correct application of the law was not and could not have been the sole or even the predominant inducement to the issuance of the patents. Furthermore where there is an aggregate of inducements as in this case, it is not possible for any man to determine whether the result would have been attained with some of the inducements wanting.

Where such a state of facts exist, the Court will promptly give redress to the injured party. It is enough that the representations materially caused the conduct of the plaintiff, although (being combined with other motives) they were not the sole or even predominant inducement to the party's action. If a man resort to unlawful means to accomplish an unlawful purpose, the law will not stop to measure the inducement.

We submit the following authorities in connection with our proposition that the false representations made were material, that they were relied upon and were intended to operate and did operate as one of the inducements to the issuance of patents.

Th rule as laid down in *12 Ruling Case Law,* p. 297, is as follows:

> "To constitute fraud in any case, the facts misrepresented or concealed must have been material facts and they must also substantially affect the interests of the persons alleged to have been defrauded. A fact is material when it influences a person to enter into a contract, or when it deceives him and induces him to act, or when without it the transaction would not have occurred. It is broadly stated therefore that the representations must have operated as an inducement to the making of the contract in question. That is, must have influenced the mind of the party to whom they are made in making the contract or fixing its terms. If he would have done so as readily had he been apprised of the facts, then he has not been defrauded. It has been declared, however, that whether the complaining party would have made the contract but for the representations, is not the test of his right, since that is often a mere speculative inquiry and that if the false representations were material and relied upon and were intended to operate and did operate as one of the inducements to the contract, it is not necessary to inquire whether the plaintiff would or would not have made it without this inducement."

At page 301 it is said:

> "It has been held, however, that the representations need not relate directly to the nature and character of the subject matter of the contract, but that it is sufficient if they are so closely connected with the contract that the parties would not, but for the representations, have entered into it and were in-

duced to enter into it to the knowledge of the other party by such representations."

As stated in White Sewing Mach. Co. vs. Bullock, 76 S. E. (N. C.) 634:

"False representations inducing a contract are material if the contract would not have been made but for such representations."

The subject as treated by *Bigelow on Fraud,* Vol. I, p. 544, is stated as follows:

"It is not necessary to prove that the plaintiff relied solely upon the defendant's representations. It is sufficient that the representations were relied upon by the plaintiff as constituting one of the substantial inducements to his action. It is indeed sometimes said that the false representations must have been such that without them the transaction complained of would not have taken place. But it has well been said it is not possible for any man in the aggregate of inducements which led to the transaction to determine whether the result would have been attained with some of the inducements wanting. Nor should the guilty party be permitted to allege in excuse that the innocent party might have acted as he did if less deceit had been practiced upon him. If a man resort to unlawful means and accomplish an unlawful purpose, the law will not stop to measure such inducements. If, for example, a party induced by the several false and fraudulent declarations of two persons different in time and character purchases worthless property, it would not do to say that because the trade might not have been made if only one falsehood had been practiced and the purchase

not wholly induced by either, the party injured is without redress. If the fraud be accomplished and the unlawful acts of the defendant contributed thereto he is answerable. The fraudulent acts of the defendant must indeed have worked an injury but if the wrong has been done and the defendant has been a party to its commission, the court will not apportion the penalties of guilt among offenders nor divide the spoil among highwaymen."

In *American and English Ency. of Law,* Vol. 14, p. 62, it is said:

"It has been held, however, that either party may make a collateral statement made by the other party during the negotiations as to the existence or non-existence of a particular fact a material one in his own judgment, so that if it turns out to be untrue and was falsely and fraudulently made it will vitiate the contract if he relied upon the same as true and would not have entered the contract but for such statement. In other words, a contract may be avoided because of the false and fraudulent representation though not relating directly to the nature or character of the subject matter if it is so closely connected with the conduct as that the party relying upon it would not, but for the representation, have entered into it, and if he was induced to enter into it to the knowledge of the other party by such representation."

In the case of *Lane vs. Harmony,* 112 Me. 25, it was held:

"If fraud is set up it must be material, relate distinctly to the contract and affect its very essence

> and substance, and while there is no standard by which to determine whether the fraud be material or not, the rule is that if the fraud be such that had it not been practiced the contract would not have been made or the transaction completed, then it is material."

In the case of *James vs. Hodsden,* 47 Vt. 127, the court held that if a vendor's fraudulent representations constituted one of the inducements to the purchase, it was sufficient to avoid the sale. We beg the indulgence of the court to quote somewhat fully the opinion in this case, as we believe it is pertinent to the question here involved.

> "The charge of the court 'that it was not necessary that they should find that the plaintiff relied solely upon the representation but it was sufficient for them to find the representations were so far relied on by the plaintiff as to constitute one of the inducements to the trade in question' we think sound and reasonable. Under the charge the jury must have found that the plaintiff was deceived and defrauded. That he was in fact cajoled into the purchase of the patent right of no value and giving his notes for a large sum by the false assertions of the defendant and his conspirators. It is often said that the false representations must have been such that without them the trade would not have been made, but it is never possible for any man in the aggregate of inducements that effected the sale to determine whether the result would have been attained with some of the inducements abated, nor should the guilty party seeking the benefit of the

sale and induced in a measure by his fraud and falsehood be permitted to allege in excuse that the innocent party might have been made the purchase if the defendant practiced less deceit and his lies had been less flagrant. If he resorts to unlawful means and accomplishes a fraudulent purpose the law will not stop to measure the force of such inducements. It is enough that the party was deceived and cheated and the defendant's falsehoods and fraudulent practices contributed to that end. A misrepresentation must be something material in which the party relies and puts confidence and is misled and cheated (1 Story Eq. 197, 203). If the party induced by the several false and fraudulent declarations of two persons different in time and character, purchase worthless property, it would not do to say that because the trade might have been made if only one falsehood had been made and the purchaser not wholly induced by either, therefore, he is without remedy or redress. If the fraud is accomplished and the unlawful acts of the defendant contributed thereto he is answerable. The fraudulent acts of the defendant must indeed have worked an injury, but if the wrong has been done and the defendant is party to its commission the court will not apportion the penalties of guilt among offenders nor divide spoils among highwaymen."

In *Safford vs. Grout,* 120 Mass, 20, the head note reads as follows:

"In an action for false representation it is sufficient if such representations materially influenced the conduct of the plaintiff, though they were not the sole or predominant inducement. It is enough if they had material influence upon the plaintiff although combined with other motives."

It is stated in *Bigelow on Estoppel,* Sixth Edition, page 646, that while the representation must be material, this does not mean that the representation in question must have been the sole inducement of the change, or the change of position, if it were adequate to the result. Thus if it might have influenced the conduct of a prudent man, that would be enough, though other inducements operated with it, and the law will not undertake in favor of the wrong-doer to separate the various inducements presented and ascertain how much weight was given to the representation in question.

There accordingly seems to be no dearth of authorities holding that while as a general proposition of law the representations must be material, yet where the contract or transaction is induced by a number of representations, the court will grant redress without stopping to measure the inducements and determining the particular one which prompted the contract. As has been made clear in this case, the representation as to residence could not have been and was not the sole and inducing cause, to the issuance of patent. Even with the military service erroneously allowed proof of some actual residence was essential. Proof of good faith was essential; proof of non-alienation was essential, all of which by reason of their falsity contributed to the issuance of the patent.

A different situation might have presented itself had patent been issued solely because of the military service of the entrymen, and it was the sole and inducing cause, but no such situation was presented by the pleadings, and no such contention has been or can be made.

II.

ONE WHO HAS EFFECTED HIS PURPOSE THROUGH A FRAUDULENT MISREPRESENTATION CANNOT DENY ITS MATERIALITY.

It does not lie in the mouth of Jones and of the entrymen to now declare that the fraudulent representations were immaterial. It is sufficient to say that they were relied and acted upon and that they were fraudulent and were made with the intent to deceive and defraud the government. So states *Bigelow on Fraud,* volume I, p. 497:

> "A party who has effected his purpose through a misrepresentation cannot deny its materiality."

To permit defendant to invoke the rule as to materiality in spite of his active efforts to conceal the true condition of affairs, to thwart investigation and inquiry, would be to encourage fraudulent and deceitful practices.

In *Strand vs. Griffith,* 97 Fed. 854, it is held that a seller who practices fraud and deceit to induce a purchaser to accept goods without examination which he would otherwise have made, would not be heard to say in defense to an action for fraudulent representation that the plaintiff was cheated as a result of his own negligence and credulity, and is therefore without remedy. That as between original parties, one who has intentionally deceived the other to his prejudice is not to be heard to say in defense of the charge of fraud that the innocent party ought not to have trusted him. The very representations relied upon may have caused the party to desist from inquiry and neglect his means of information.

In *Autle vs. Sexton,* 137 Ill. 410, the court said:

> "Where a misrepresentation is made as to a material fact and such misrepresentation is made knowingly and for the express purpose of deceiving and defrauding, and the injured party relies upon the statement made and under circumstances which would induce a reasonably prudent man to so rely, there must be a right of action at law for fraud and deceit. To throw a purchaser out of court in such a case upon the plea he did not avail himself of the means of knowledge open to him would be offering a premium on fraud and would be destructive of confidence in business transactions."

In *Dodge vs. Pope,* 93 Ind. 480, the rule is laid down as follows:

"Where one with knowledge of his rights and of the facts makes a statement to another to induce him to act in a given way and the statement produces the effect designed and causes the person who acts upon it to part with value, he by whom the statement was made cannot afterward be heard to deny its truth."

In *Dezell vs. Odell,* 3 Hill. 215, the court said:

"We then have a very clear case of an admission by the defendant, intended to influence the conduct of the man with whom he was dealing and actually leading him to a line of conduct which must be prejudicial to his interests, unless the defendant be cut off from the power of retraction. This I understand to be the very definition of an estoppel in pais."

In *Fargo Gas Light & Coke Co. vs. Fargo Gas & Elec. Co.,* 37 L. R. A. 593, the court held that one who buys property has a right implicitly to rely upon representations of the seller, and if they were false and made with the intent to deceive the purchaser, the seller will not be allowed to urge that the buyer by investigation could have discovered their falsity. We quote from part of the opinion:

"That would indeed be a strange rule of law which when the seller had successfully entrapped his victim by false statements and was called to account in a court of justice for his deceit would permit him to escape by urging the folly of his dupe for not suspecting that he, the seller, was a knave. * * *

The unmistakable drift is toward a just doctrine that the wrongdoer cannot shield himself from liability by asking the law to condemn the credulity of his victim."

In *Linnington vs. Strong, 107 Ill. 302,* it is held:

"As between the original parties when it appears that one has been guilty of intentional and deliberate fraud by which the other has been misled and influenced in his action, he canot escape the legal consequences of his fraudulent conduct by saying that the fraud might have been discovered had the party whom he deceived exercised reasonable care and intelligence."

In *Reynell vs. Sprye,* 1 DeG. M. and G., 710, 21 L. J. Ch. N. S. 663, it is held:

"Where one party has intentionally misled the other it is no answer to the imputed fraud to say that the party alleged to be guilty of it recommended the other to take advice or even put into his hands the means of discovering the truth. However negligent the party may have been to whom the incorrect statement has been made yet that is a matter affording no ground of defense to the other. No man can complain that another has too implicitly relied on the truth of the things he himself has stated."

In *Brent vs. Lilly Co.,* 174 Fed. 877, it is held:

"A party who has induced another to act on a certain understanding cannot, after the other has acted, deny that understanding to the other's loss."

In *Warder vs. Ehitish,,* 77 Wis. 430, 46 N. W. 540, the court says:

> "A person cannot procure a contract in his favor by fraud and then bar a defense to a suit on it on the ground that had not the other party been so ignorant or negligent he could not have succeeded in deceiving him."

In *Tooker vs. Alston,* 159 Fed. 599, it is held:

> "In an action for fraud and deceit inducing a purchase of property it is not a defense that plaintiff made other investigations and inquiry respecting the property if the fraudulent conduct of defendant was a material though not the sole inducement of the purchase."

It would seem, therefore, that the great weight of authority is in support of the just rule that however negligent the party may have been to whom the false statements have been made, yet that is a matter affording no ground of defense to the other. No man should be heard to complain that another has too implicitly relied upon the truth of the things he has himself stated. While a rule may be found in some cases favorable to the defendant's theory of the law, yet no decision can be found which establishes a doctrine under which a party would be bound under all the circumstances such as has developed in this case to make any investigation or inquiry touching the truth or falsity of the statements made.

There are many cases which sustain the view that the plaintiff had the right to rely implicitly upon the representations made by the entrymen with respect to the requirements prerequisite to patent. We are aware that cases may be found which exact from one more care in ascertaining the truth or falsity of representations. In determining what the courts in such cases intend to hold, the language of each opinion must be read in the light of the facts of the particular case. Cases should be decided as they arise, keeping in view the general principle that courts will not readily listen to the plea that the defrauded party was too easily deceived. It is a just doctrine which asserts that persons engaged in fraud are not the objects of the special solicitude of the courts.

III.

WHERE THE EXISTENCE OF FRAUD DEPENDS UPON A VARIETY OF CIRCUMSTANCES THE MATTER OF MATERIALITY OF REPRESENTATION IS FOR THE JURY AND NOT FOR THE COURT.

By a long line of cases, questions of fraud are peculiarly within the province of the jury to be determined

from all the facts and circumstances of the case. While it may be true in certain cases the court is empowered to interpret language of a perfectly plain nature unaffected by external facts, yet where there are facts and circumstances, as in this case, from which a jury might have reached a conclusion that the representations were adequate to, and did in fact, induce the issuance of the patents which would not have been issued but for such representations, it was error for the court to refuse to submit same for the consideration of the jury.

In the case of *Patten vs. Field,* 81 Atl. 77 (Me.), it is held:

> "That whether the elements of actionable deceit existed in an action therefor were questions of fact to be determined from the evidence and the inferences to be drawn from the facts established."

In the case of *McNaughton vs. Smith,* 91 Minn. 140, it is held:

> "Where the existence of fraud depends on a variety of circumstances arising from motive and intent and inference from circumstantial evidence, the court should submit the question to the jury with proper instructions concerning the tests of fraud."

In the case of *Mosby vs. McKee,* 91 Mo. App. 500, it is held:

> "Although fraud cannot be predicated on mere conjecture, still every slight circumstance will warrant the submission of the issue involving it to the jury, especially if it may be inferred from all the facts and circumstances."

In the case of *Southern Commission Co. vs. Porter,* 122 N. C. 692, it is held:

> "Where a transaction bears such evidence of fraud that it might be properly inferred it is error to refuse to submit the question to the jury."

In *Simon vs. Goodyear Metallic Rubber Shoe Co.,* 105 Fed. 573, it is held:

> "The question whether a representation made was fraudulent is a question of fact to be determined by the jury."

That the question of materiality is for the jury is supported by the following cases:

Fottler vs. Moseley, 179 Mass. 295.

Hawley vs. Wicker, 117 N. Y. App. Div. 638.

Kehl vs. Abram, 210 Ill. 218.

The case of *Fottler vs. Moseley,* 179 Mass. 295, was an action for deceit wherein it was alleged that relying upon the false and fraudulent representations of the defendant, a broker, that certain sales of stock were genuine transactions, the plaintiff revoked an order for the

sale of certain shares of that stock held for him by the defendant, whereby the plaintiff suffered loss. It was contended by the defendant that the representations were not material, that the false representations to be material must not only induce action but must be adequate to induce it by offering a motive sufficient to influence the conduct of a man of average intelligence and prudence and in this case the representation complained of so far as it was false was not adequate to induce action because the fictitious sales were so far and distant in time and that therefore it was not material. The court held:

> "A corporation may be so small and of such a nature and have so slight a hold upon the public, and the number of its shares may be so small and the buyers so few that the question of whether certain reported sales are fictitious may have a very important bearing upon the action of such a man. Upon the facts in this case, I cannot say as a matter of law that the representations so far as false were not material. This question is for the jury who are to consider it in the light of the nature of the corporation and its standing in the market and other matters including such as those of which I have spoken."

In the case of *Hawley vs. Wicker,* 117 N. Y. App. Div. 638, it was contended that the representations made by plaintiff were expressionless of opinion, and were immaterial. The court held that it could neither be main-

tained as a matter of law that they were mere expressions of opinion, nor that they were immaterial representations. That the jury would have been justified in finding that the representations concerning a certain matter were material representations; that it was false and that it was one of the inducements which led to the contract.

In the case of *Kehl vs. Abram,* 210 Ill. 218, which was an action for damages for deceit, it was insisted that the court erred in one of its instructions to the jury that if a party dealing with another makes use of fraudulent statements, representations and acts with respect to the material inducement of the transaction, etc., such party cannot afterwards be heard to say that the party with whom he was dealing was misled, etc., and it was contended that it was error to have mentioned "material inducement" without defining such term; that what is material inducement is a question of law and not of fact. The court, in its opinion, held:

> "I think there is a broad distinction between material allegations of a declaration and material inducements of a party entering into a transaction. A declaration is strictly a legal term and one not versed in legal phraseology would not be supposed to be able to determine what are the essential or material parts of a declaration but a jury are supposed to be as well acquainted with human nature as the

judge who instructs them and know as well the things that prompt individuals to action and it is peculiarly their province to say what are or what are not material inducements in a transaction where one party claims to have been overreached and deceived by the alleged false conduct of another against whom redress is sought. If the jury are of the opinion that the alleged false statements were of no consequence in causing the plaintiff to act as he did it is their duty to find in favor of the defendant, otherwise against him. This principle is recognized and applied in the law governing insurance policies and in actions upon such the jury may be instructed that if the statements made to secure the policy have been fraudulent and are material then the policy may be avoided, but where the statements though not correct have not been material in inducing the issuance of the policy, then the same is not to be avoided and in such cases the question of the materiality is left to the determination of the jury."

To like effect are the following:

Sharp vs. Ponce, 74 Me. 470.

"To determine whether the representation made was of material facts or not was a question for the jury, and not for the court.

Newhall vs. Pierce, 115 Mass. 457.

"The question whether or not the concealment was of a material fact was one of fact for the jury."

Irrespective of the authorities cited in support of the contention that the question of materiality of representa-

tions was for the jury, it is apparent that this rule is founded on good reason. Where a number of representations are made as in this case, it certainly would be usurping the province of the jury for the court to declare as a matter of law that certain representations were immaterial. What might have been the motive of the party to whom such representations were made in entering into the contract, is best known to that party himself. What might have been inducement to one may not have been an inducement to another. It would therefore follow that the jury, composed of men supposed to have a peculiar knowledge of the foibles and imperfection of mankind, would be in a better position to judge as to whether or not certain representations were material and were the inducing cause to the contract.

THE WELLS ENTRY.

A different situation is presented with regard to the Wells entry. Wells made application October 1, 1900, and commuted May 26th, 1902, by the payment of the original price of $1.50 per acre. It is conceded that under the provisions of Section 2301 R. S. Wells was entitled to commute on making proof of settlement and residence and cultivation for a period of 14 months. It is contended that the Act of August 15, 1894, requires

actual residence, and it is claimed by defendant that inasmuch as the proof submitted by the entryman Wells, of residence upon his entry, showed his actual presence upon the land for a total of no more than ten weeks, that the patent should not, as a matter of law, have been issued to him, and therefore the government knowing the law and the requirements thereof had no right to rely upon the representations of Wells, and consequently no action for deceit can lie.

After the passage of the Act of May 17th, 1900, which repealed that portion of the act which required payment of $1.50 per acre for the lands in question, a second act was passed, being that of January 26th, 1901, extending the right of commutation to these lands upon the payment of the original price of $1.50 per acre. The commutation section of the revised statutes, Section 2301, was extended to this entry. Said section reads as follows:

> "Nothing in this chapter shall be so construed as to prevent any person who shall hereafter avail himself of the benefits of Section 2289 from paying the minimum price for the quantity of land so entered at any time after the expiration of 14 calendar months from the date of such entry upon making proof of settlement and residence and cultivation for such period of 14 months.

It will thus be seen that a commuted entry, by the payment of the minimum price, is governed by this section, and not by the act of 1894. The Wells entry was therefore such a commuted entry, and cannot in any wise be affected by the act of 1894, which contemplates a different character of residence where no commutation is made. It is specifically stated in Section 2301 that commutation shall be allowed upon the payment of the prescribed price after making proof of settlement, residence and cultivation for 14 months. It would be a strained construction of this statute to now disregard the common understanding of the character of residence contemplated by this section, by declaring that such residence must be "actual." We do not believe that defendant will make such a contention but will base his argument upon the proposition that notwithstanding that this entry was commuted, it must comply with the character of residence demanded by the act of 1894, and not by that of Section 2301 R. S. This, however, we think untenable, and not justified by the state of facts here presented.

It is submitted that the question of residence is largely one of bona fides and not one of actual presence for any length of time on the entry. If, as is alleged in the complaint, and not denied in the answer, Wells during

the period of 14 months covered by his final proof, maintained his home and actual residence elsewhere than on his entry, the proof, even though showing his actual presence upon the land for every day of the 14 months would nevertheless fail to comply with the requirements of the law. On the other hand, if the fact that Wells was making the entry his *home,* to the exclusion of any other, and with a bona fide intention of so doing during the entire 14 months covered by his proof, he might under certain circumstances lawfully be absent therefrom practically the whole of the time and yet his proof be good. So far as the Government is advised and has been able to determine, this has been the invariable rule of the Department of the Interior in passing upon proof submitted in homestead entries, and is the only rule by which the question of compliance by the entrymen with the law requiring residence may be determined.

Furthermore, as has been shown, entry was not made entirely under the strict provisions of the Siletz law, as was done in the case of the other eight entrymen, but was made in accordance with the provisions of the act authorizing commuted entries, which permitted constructive residence. In other words, where no commutation was authorized, three years actual residence appears to have been required, yet, where it was authorized, there

seems to be no good reason why the method of commutation should be changed, modified or enlarged from that provided for in Section 2301 R. S. By a common sense construction of the latter requirements, no actual presence upon the land is essential. The character of residence required thereby is dependent entirely upon the good faith of the entrymen. It would thus appear from the opinion to be found in the case of *Waley v. Northern Pacific Railroad Company,* 167 Fed. 565, approving the court's ruling in the case of *U. S. Richards,* 149 Fed. 445,

> "To establish a residence under the Homestead Law, there must be a combination of act and intent —the act of occupying and living upon the claim and the intention of making same a home to the exclusion of a home elsewhere."

It therefore appears that so far as the Wells entry is concerned the court plainly erred in granting judgment upon the pleadings as to him, for the Government was required by law to issue patent upon the submission of his proofs, the statements therein having been relied upon by the Government as true. There having been a showing that the requisite term of residence had been maintained, in reliance upon which patents were issued, it was error of the court to hold that the false and fraudulent proofs submitted in support of the Wells entry were immaterial.

IN CONCLUSION.

It cannot be that the law will sanction the deliberate, unconscionable fraud of defendant without exacting retribution. For the government to fail to take all the remedies at its disposal to protect the public rights invaded by the defendant would be to breach its sacred trust. Its action for deceit was instituted to that end, being the only remedy left to the government. The law recognizes principles on which it may be supported. The principle on which it is contended to rely is that wherever deceit or falsehood is practiced to the detriment of another the law will give redress. The fraud is that the defendant induced the entrymen to make false representations which he and they knew to be false, whereby the government parted with title to valuable tracts of land. Here then is the fraud and the means by which it was committed.

It is an elementary principle of fraud that when one makes a false representation, knowing it to be false, with the intent to induce another to make or enter into a contract which but for such representation would not have been entered into, and the plaintiff has been damaged, a clear case of fraud is made out.

All the elements of actionable fraud and deceit are present in the case at issue. The entryman made false representation as to all the requirements prerequisite to patent which were made with the intent to deceive and defraud the plaintiff. They were acted and relied upon to plaintiff's damage, *and but for such representations the patents would not have been issued.* True as to one of the inducements, the land department erred as a proposition of law, and while such patents might not have been issued had such error not intervened, neither can it be gainsaid but that the patents would not under any circumstances have been issued had not the fraudulent proofs been submitted.

In homestead entries such as in this case, the sole consideration required by the government consists of residence and cultivation of the lands *in good faith,* and where such consideration was not given, but instead it was falsely represented that the same had been made, the government is defrauded of the value of the land.

First. The lands could not be secured in any event except by some proof of period of actual residence. In other words, they were given to the entrymen in consideration of improving and developing the land itself and incidentally the community. While the proof as to

the required term of residence is insufficient as a matter of law, yet even with the allowance erroneously made for military service, a period of actual residence was necessary. There was proof of some period of residence, and the proof as to this residence was false and fraudulent. Furthermore, the proof of residence could not under the express requirements of the homestead act, have been the sole, proximate or inducing cause to the issuance of patents, and therefore, how can it be said that the remaining representations were immaterial, if they were just as important and essential as the proof of residence?

Secondly. The Siletz act was violated by the entrymen making the entries for the benefit of the third party. If these things are true, then it cannot be comprehended how the military service would have entitled the entrymen to have taken the lands for the benefit of Jones, and therefore how can it be said that the erroneous allowance of military service would have rendered the fraud and deceit in this particular immaterial?

The homestead is a gift of the government to the homesteader, conditioned upon his occupation for a certain period of years, and upon his making no disposition of alienation during such term. The affidavit of non-

alienation is as clear an expression of the legislative intent as a direct prohibition. The policy of the government in this respect would be thwarted if the homesteader were permitted to alienate the land prior to the expiration of the prescribed time, or contract for such alienation for a fraudulent purpose. A successful alienation could only be accomplished by perjury, and an attempted alienation could only afford a constant inducement to the homesteader to abandon his occupation of the land. Therefore, the beneficient policy of the government would be set at naught, were the conduct of the defendant to go unpunished.

It must be apparent that the application for homestead was made in bad faith, was tainted with fraud, and for the purpose of assisting and aiding the defendant. Plainly, the entrymen had no intention of ever becoming homesteaders. The whole transaction was a scheme or conspiracy on the part of the defendant, to fraudulently obtain the ownership of these lands from the United States. There can be no question of the fraud and its misleading effects on the officers of the government. The very representation as to some actual residence which was relied upon by the government officials caused them to desist from inquiry, and neglect their means of information.

Surely, the law will not reward dishonesty and falsity. Surely deception, artifice, trickery and unfair dealing will not be allowed to operate as a shield and protection to the deliberate frauds and cheats of sharpers. No stronger case has been found, where reason demands the adoption of the rule that one who has effected his purpose through fraud cannot deny its materiality if relied upon to the other's injury. It should not, it cannot, lie in the mouth of the defendant to say the representations were immaterial. He who is a fraud and a cheat certainly cannot escape from liability by asking the law to applaud his fraud and condemn his victim for its credulity. No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance too trusting, too credulous and too relying upon honesty and fair dealing in those who part with nothing and attain a gift. For, after all, this valuable land was the gift of the government and this has been its reward.

With the hope that this brief may be of assistance to the Court it is respectfully submitted.

CLARENCE L. REAMES,
United States Attorney.

BARNETT H. GOLDSTEIN,
Assistant United States Attorney.